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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vitaplex, Inc.

Serial No. 76/309327

Myron Amer of Myron Amer, P.C. for Vitaplex, Inc.

Danielle I. Mattessich, Trademark Examining Attorney, Law
Office 101 (Jerry L. Price, Managing Attorney).

Before Cissel, Hanak and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Vitaplex, Inc. sought to register the mark VERITAS on
the Principal Register for goods ultimately identified as
"bottled water" in International Class 32.¹

This case is now before the Board on appeal from the
final refusal to register based upon Section 2(d) of the
Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining
Attorney has held that applicant's mark, when used in
connection with bottled water, will so resemble the mark

¹ Application Serial No. 76/309327, filed on September 6,
2001, is based upon applicant's allegation of a *bona fide*
intention to use the mark in commerce.

VERITAS that is registered for "nutritional products, vitamins, minerals, weight loss products, namely, dietary supplements," in International Class 5,² as to be likely to cause confusion, to cause mistake or to deceive.

Responsive to the refusal to register, applicant argues that there is no likelihood of confusion in this instance because registrant's goods and applicant's goods are significantly different. On the other hand, the Trademark Examining Attorney argues these are closely related products, both of which will be purchased by the same health-conscious consumers.

Both applicant and the Trademark Examining Attorney have fully briefed the case. Applicant did not request an oral hearing before the Board.

We affirm the refusal to register.

In the course of rendering this decision, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The du Pont case sets forth the factors that should be considered, if relevant, in determining likelihood of confusion). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental

² Registration No. 2,399,777, issued to TSA International, Inc., on October 31, 2000.

inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

As noted by the Trademark Examining Attorney herein, applicant has adopted as its mark the word VERITAS - which is identical in every way to registrant's prior mark. Hence, when both registrant and applicant are using or intend to use the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Ancor, Inc. v. Ancor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source").

Applicant argues that this relationship is nothing more than the fact that both items might well be sold somewhere in the same large retail operation. However, this record provides strong clues that these goods are much more intimately related than applicant would have us

believe. For example, water from mineral springs, often thought to have curative powers, has been bottled and sold far from its source for many years. Cf. Skol Company Inc. v. Olson, 33 C.C.P.A. 715, 67 USPQ 96 (CCPA 19450 [Because SKOL mineral water was promoted as having medicinal properties, it has same descriptive properties as SKOAL suntan lotion]. And of course, the registrant's dietary supplements herein are much closer to bottled water than is suntan lotion. Moreover, "minerals" are listed among the dietary supplements contained in registrant's nutritional products.

The Trademark Examining Attorney has also placed in the record a number of recently-issued, third-party registrations that demonstrate an ever-closer tie between these goods.³ For example, it appears from Trinity Water's registrations that its mineral spring water is actually a

³ We note applicant's objections to these third-party registrations in its reply brief. However, while such registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Most of these registrations have only two classes of goods, where the goods are described very similarly but then correctly classified according to the emphasis in International Class 5 (supplements) as well as in International Class 32 (water).

natural dietary supplement.⁴ Furthermore, the identifications of goods alone (from several of the third-party registrations made of record) demonstrate that these companies have started unveiling bottled water products that are supplement-enhanced. That is, bottled water has become a delivery system for additional vitamins and nutrients dissolved in the water. For example, Peace Mountain Natural Beverages has positioned SKINNY WATER as a natural appetite suppressant - and not surprisingly, registrant's International Class 5 supplements include "weight loss products." The ISOSTAR sports drink with a single formulation delivers rehydration (International Class 32) and supplementation (International Class 5). Hence, we find that the goods herein are quite closely related.

Turning next to the du Pont factor that focuses on the similarity or dissimilarity of established, likely-to-continue trade channels, we note that the goods are identified with no restrictions as to trade channels or purchasers in either the application or the registration. The Board must determine the issue of likelihood of

⁴ See federal regulations issued in response to the Dietary Supplement Health and Education Act (DSHEA), specifically at 21 C.F.R. §165.110, "Bottled Water."

confusion on the basis of the goods as identified in the application and the registration. See Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Thus, the Board must consider that the parties' respective goods could be offered and sold to the same class of purchasers through all normal channels of trade. See Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994).

As to the marketing conditions under which and buyers to whom sales are made, we agree with the Trademark Examining Attorney that both applicant's and registrant's products will appeal to the same "New Age" class of consumers, namely those having a relatively high degree of concern over matters of nutrition and health. On yet the other hand, inasmuch as the retail prices for each of these products (food supplements and bottled water) are fairly modest, the prospective purchasers must still be considered to be fairly ordinary consumers.

As to the number and nature of similar marks in use on similar goods, we note that the earlier cited registration for the mark VERITAS registered in connection with wines is still a part of this record. It has not been "expunged"

from the record, and is probative to our weighing of this particular du Pont factor. However, we find that the Trademark Examining Attorney has made a compelling case for likelihood of confusion herein in spite of the existence of this third-party VERITAS registration for another type of beverage. In short, we find that alcoholic beverages like wines are not as closely related to bottled water (a non-alcoholic beverage) or to nutritional supplements as bottled water is to nutritional supplements.

In summary, in a situation where identical marks are applied to closely-related, relatively-inexpensive products that will be marketed through the same trade channels to the same class of ordinary consumers, we find a likelihood of confusion.

Decision: The refusal to register is affirmed.